

# Commonwealth Of Kentucky

## Court Of Appeals

NO. 1998-CA-000539-MR

KEVIN BASHAM; FRED D.  
WILLIAMS; and CHRIS DUFF

APPELLANTS

v. APPEAL FROM ANDERSON CIRCUIT COURT  
HONORABLE WILLIAM F. STEWART, JUDGE  
ACTION NO. 97-CI-000040

BOBBY L. ROARK; MARCIA  
H. ROARK; and FISCAL COURT  
OF ANDERSON COUNTY, KENTUCKY

APPELLEES

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OF ANDERSON COUNTY, KENTUCKY;  
AND LAWRENCEBURG - ANDERSON  
COUNTY JOINT PLANNING AND  
ZONING COMMISSION

APPELLEES

OPINION  
AFFIRMING

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BEFORE: DYCHE, GUIDUGLI, AND MCANULTY, JUDGES.

DYCHE, JUDGE. Kevin Basham, Fred D. Williams, and Chris Duff appeal from a ruling of the Anderson Circuit Court denying their motion to intervene in a settled action to which they were not original parties, and dismissing their petition on appeal and for declaratory judgment. We affirm.

Bobby and Marcia Roark applied to the Lawrenceburg-Anderson County Joint Planning and Zoning Commission (the Commission) to have approximately 82 acres of their property rezoned from A-1 (Agricultural) to R-1 (Low Density Residential). The Commission had a public hearing on the application on July 9, 1996, at which it tabled the application and asked the Roarks to provide additional documentation concerning the proposed development, specifically a plan for sewage service to the area. At a Commission meeting on November 12, 1996, the Roarks presented a resolution from the Alton Water and Sewer District agreeing to provide water and sewage treatment to the development. Based on this change in circumstances, the Commission voted to approve the zone map amendment. Appellants, in opposition to the amendment, were present not only at these two meetings, but also at the intervening monthly meetings at which the application was not discussed.

The Anderson Fiscal Court, by a vote of 4-3, voted on January 21, 1997, to override the Commission's recommendation and deny the zone map amendment. Prior to this meeting, the Roarks

had commenced an unsuccessful action in Anderson Circuit Court seeking a restraining order to prevent two magistrates who had a personal interest in the outcome of the proceedings from participating in deliberation on the matter. All parties were at that time aware of the magistrates' conflicts of interest. The magistrates nevertheless improperly deliberated and voted on the recommendation, in violation of the Anderson County Ethics Code, both voting to override the Commission.

The Roarks then filed this action in Anderson Circuit Court seeking relief from the improper vote of the fiscal court, and a separate action against the magistrates for their improper participation. While these actions were pending, the Anderson County Attorney was required to withdraw as counsel for both the two magistrates and the fiscal court due to conflict of interest concerns. The fiscal court met on July 22, 1997, and in an attempt to settle the litigation, authorized the County Judge-Executive to enter into an Agreed Order and Judgment with the Roarks. The order, entered by the circuit court on July 24, 1997, stated that because the two magistrates were required to recuse themselves but instead had participated in the deliberation of this issue contrary to law, their participation rendered the January 21, 1997, action of the fiscal court null and void, as if it never existed. As a result, the recommendation of the Commission became effective by operation of law and the zone map amendment took effect pursuant to Kentucky Revised Statute [KRS] 100.211.

Appellants filed a motion on August 4, 1997, after final judgment was entered by the circuit court, to intervene in the settled action. On August 21, 1997, they also filed a separate petition to appeal pursuant to KRS 100.347 and a petition for declaratory judgment. The motions were denied by the Anderson Circuit Court on February 3, 1998, and these appeals followed.

Appellants seek to intervene pursuant to Ky. R. Civ. Proc. [CR] 24. Both CR 24.01 and CR 24.02, cited as applicable by appellants, require a "timely application" to intervene. A party seeking to intervene after judgment has a special burden of justifying the lack of timeliness. Pearman v. Schlaak, Ky., 575 S.W.2d 462 (1978). Appellants have not met that special burden required to permit intervention.

Pearman dealt with a similar fact situation. There, as in this case, the zoning commission recommended a zone map amendment and the city council voted to deny the change. The Pearmans filed a complaint in circuit court against the city council, and the court ultimately entered an order setting aside the council's action and directing the council to re-zone the property, from which the council did not appeal. In characterizing the actions of the would-be intervenors, the Court stated that

Virginia Schlaak and the other property owners did not participate in the trial of this case because they had not sought intervention prior to judgment. They were seeking a free ride on the train of the Radcliff City Council, and were left at the station when the city council failed to

prosecute an appeal from the decision of the trial court.

Id. at 463-64.

Appellants in this case are similarly situated. From the initial presentation by the Roarks to the Commission through the disposition of the case in circuit court, appellants watched the proceedings from the sidelines, sitting on their rights rather than acting to protect their interests.

Appellants claim that they could not reasonably have foreseen that the Anderson Fiscal Court would reverse its position and allow the zone map amendment to take effect. We are not persuaded by this argument. Appellants were aware before the fiscal court voted on the Commission's recommendation that two of the magistrates had potential conflicts of interest, one as an adjoining landowner. Because KRS 100.211 requires a majority of the entire fiscal court to override a commission recommendation, the recusal of even one of the magistrates made it impossible, in this situation, for the court to prevent the map amendment from taking place, as both parties conceded below. The fact that appellants had actual notice of the proceedings from their inception, attended most, if not all, of the hearings regarding this matter, and were in contact with the neighboring magistrate prior to the fiscal court's vote belies the contention that appellants were blind-sided by either the illegality of the fiscal court's action or its ultimate disposition of the litigation. As in Pearman, appellants were content to "sit under their own 'vine'" and leave the burden of defending the action to the fiscal court. 575 S.W.2d at 463. The circuit court

correctly held that appellants had shown no justifiable cause why they failed to timely intervene.

Appellants also claim that they should be permitted to pursue an appeal under KRS 100.347. That statute provides in pertinent part:

(2) Any person or entity claiming to be injured or aggrieved by any final action of the planning commission shall appeal from the final action to the Circuit Court . . . . Such appeal shall be taken within thirty (30) days after such action. Such action shall not include the commission's recommendations made to other governmental bodies. All final actions which have not been appealed within thirty (30) days shall not be subject to judicial review. . . .

(3) Any person or entity claiming to be injured or aggrieved by any final action of the legislative body of any city, county, or urban-county government, relating to a map amendment shall appeal from the action to the Circuit Court . . . . Such appeal shall be taken within thirty (30) days after the final action of the legislative body. All final actions which have not been appealed within thirty (30) days shall not be subject to judicial review. . . .

\* \* \*

(7) For purposes of this chapter, final action shall be deemed to have occurred on the calendar date when the vote is taken to approve or disapprove the matter pending before the body.

KRS 100.347. In this instance the recommendation was forwarded to another governmental body, the Anderson Fiscal Court. KRS 100.211 states the following:

(1) . . . Unless a majority of the entire legislative body or fiscal court votes to override the planning commission's recommendation, such recommendation shall become final and effective and if a recommendation of approval was made by the planning commission, the ordinance of the fiscal court or legislative body adopting the

zoning map amendment shall be deemed to have passed by operation of law.

\* \* \*

(7) The fiscal court or legislative body shall take final action upon a proposed zoning map amendment within ninety (90) days of the date upon which the planning commission takes its final action upon such proposal.

KRS 100.211.

According to KRS 100.347, a planning commission's recommendation to another governmental body is not subject to appeal. If the fiscal court fails to take action within ninety days, the recommendation becomes effective by operation of law pursuant to KRS 100.211.

Rules of statutory construction require a court to read statutes in connection and in harmony with each other, if possible. Mitchell v. Kentucky Farm Bureau Mutual Insurance Co., Ky., 927 S.W.2d 343, 346 (1996). KRS 446.080 requires a court to construe all statutes liberally with the goal of implementing the intent of the legislature. Mullins v. Commonwealth, Ky., 956 S.W.2d 210 (1997). This case presents that unusual situation in which no lawful action was taken by the fiscal court within the prescribed ninety day period. Given the comprehensive appeals scheme set out in these statutes, we do not believe the legislature intended to deny aggrieved parties a remedy if the fiscal court allowed a planning commission recommendation to become effective by inaction. However, there is no apparent avenue of appeal for parties who do not receive the benefit of a lawful vote of the fiscal court within the prescribed time limit. If no lawful vote is taken, then the expiration of the ninety day

period shall constitute a final action and the thirty day period for appeal of a final action shall begin to run.

It does not, however, afford relief to appellants in this case. The ninety day period for action by the fiscal court expired in February, 1997, and the thirty day period for appeal of the final action expired in March, 1997. Appellants did not file the petition to appeal until August 21, 1997, well beyond the expiration of either of these periods. Appellants were aware, even before the fiscal court voted in January, that there was a potential problem with the votes of two magistrates who were committed to opposing the zone change. They at all times had the opportunity to intervene in an effort to protect their interests, but chose not to do so. We cannot say that appellants lacked notice of the zone change because of their involvement throughout the proceedings. The circuit court correctly dismissed appellants' petition to appeal.

For the foregoing reasons, the judgment of the Anderson Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANTS:

Robert W. Kellerman  
Frankfort, Kentucky

BRIEF FOR APPELLEE  
ANDERSON COUNTY FISCAL COURT:

C. Thomas Hectus  
Louisville, Kentucky

BRIEF FOR APPELLEES  
BOBBY AND MARCIA ROARK:

Robert L. Roark  
Lexington, Kentucky

Thomas M. Jones  
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